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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, and JACK MARKMAN,

Plaintiffs,

v.

UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE MIKE SCHULTZ, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity,

Defendants.

LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, TO STAY FURTHER PROCEEDINGS

Case No.: 220901712

Honorable Dianna Gibson

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INTRODUCTION & BACKGROUND

Plaintiffs' first amended complaint raises seven counts challenging the 2021 Congressional Plan and one count challenging the 2011 Congressional Plan. Counts I-IV remain the same as in the original complaint, and the Utah Supreme Court has retained jurisdiction over those claims. *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶220, 554 P.3d 872 ("*LWV*"). Count V seeks to challenge S.B. 200's various provisions that amended Proposition 4 and to revive certain provisions of Proposition 4. FAC ¶¶310-19 (Doc 297). That claim is the subject of the parties' cross-motions for summary judgment that are currently being briefed. *See* Pls.' MSJ (Doc 293); Leg.-Defs.' Cross-MSJ (Doc 405).

Plaintiffs' newly added Counts VI-VIII are premised on Count V. Count VI is entirely premised on Count V as it alleges that the Legislative Defendants failed to follow the procedural requirements of Proposition 4 when the Legislature enacted the 2021 Congressional Plan. FAC ¶¶320-27. Count VII is also entirely premised on Count V as it alleges that the Legislature failed to abide by Proposition 4's substantive requirements. FAC ¶¶328-54. Count VIII challenges the 2011 Congressional Plan, assuming that if this Court were to enjoin the use of the 2021 Congressional Plan, the 2011 Congressional Plan would become operative again; Count VIII alleges that the 2011 Congressional Plan is malapportioned in violation of the Utah Constitution. FAC ¶¶355-62.

The Court should dismiss Counts VI-VIII. Those Counts are premised on Count V. As the Legislative Defendants explained in their opposition to Plaintiffs' motion for summary judgment and their cross-motion for summary judgment, Count V fails because (1) Proposition 4 was not a proper exercise of the initiative power to reform or alter the government through a statute; (2) S.B. 200 did not impair or infringe on Proposition 4's reforms; and (3) in any event, S.B. 200 withstands strict scrutiny. Leg.-Defs.' Cross-MSJ, at 27-73. S.B. 200—not the amended provisions of Proposition 4—is the governing law. Without Count V—and the various provisions of Proposition 4 that Plaintiffs want to revive—Counts VI-VII fail. And to the extent that Count VIII is premised on the alleged violations of Proposition 4, this Court should also dismiss it.

This Court should also stay further proceedings on Plaintiffs' new claims pending the resolution of (1) the parties' cross-motions for summary judgment on Count V; (2) the anticipated appeal on Count V; and (3) the resolution of the pending interlocutory appeal regarding Counts I-IV. If this Court agrees with the Legislative Defendants that Count V fails, Counts VI-VII also fail as a matter of law. And Count VIII also fails to the extent it is premised on Counts V-VII, and to the extent it turns on Counts I-IV, it will become obsolete if the Utah Supreme Court resolves the pending Counts I-IV in the Legislative Defendants' favor.

Even if this Court were to agree with Plaintiffs on Count V, the most prudent course is to stay Counts VI-VIII until the parties and this Court know whether the governing law is S.B. 200 or (some parts of) Proposition 4. If the Legislative Defendants ultimately prevail on Count V, Counts VI-VII will become obsolete. So will Count VIII to the extent it is premised on Counts V-VII. Critically, even Plaintiffs' prevailing on Count V does not end the case. This Court would still need to determine the appropriate remedy for Count V, and Counts VI-VII become ripe only then. And the Legislative Defendants have—and reserve—the right to test Plaintiffs' standing, dispute the merits, and brief the propriety and scope of remedy on Counts VI-VII after the motion-to-dismiss stage. Counts VI-VII could require fact and expert discovery to allow the Legislative Defendants to test standing, argue the merits, and brief the propriety and scope of remedy. But the parties will not be able to litigate the case without first knowing what the governing law is. Nor should they dive headlong into expensive discovery and litigation efforts before Count V (which underpins Counts VI-VIII) is resolved. The same is true of Counts I-IV. The Utah Supreme Court retained jurisdiction over these counts, and these counts should remain stayed until these proceedings resolve whether the parties should proceed under S.B. 200, Proposition 4, or the various provisions of the Utah Constitution as governing law.

For these reasons, the Court should dismiss Counts VI-VIII. Alternatively, this Court should stay further proceedings until Count V (or Counts I-IV) are finally resolved.

ARGUMENT

I. The Court should dismiss Counts VI-VIII.

At the motion-to-dismiss stage, although this Court "accept[s] the plaintiff's description of the facts" as true, it does "not accept extrinsic facts not pleaded" or "legal conclusions." *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶13, 356 P.3d 1172. Counts VI-VIII fail for four reasons. ***First***, these claims arise under Proposition 4, which has been amended by S.B. 200. To the extent Count V fails, these claims also necessarily fail. ***Second***, Count VI fails because Proposition 4's procedural requirements impermissibly impair the Legislature's constitutional prerogative to set its own rules. ***Third***, Count VII fails because it raises nonjusticiable political questions and impermissibly prescribes substantive requirements on the Legislature. ***Fourth***, Count VIII fails because Plaintiffs' challenge to the 2011 Congressional Redistricting Plan is moot and Plaintiffs lack standing.

A. Counts VI-VIII fail because Count V fails.

Counts VI-VIII arise under Proposition 4, which S.B. 200 has amended. Because Count V—which attempts to revive the relevant Proposition 4 provisions—fails, Counts VI-VIII also necessarily fail as a matter of law.

Count VI raises three allegations under Proposition 4's procedural provisions. First, Plaintiffs allege that the Legislature did not take a mandatory up-or-down vote on the Commission's recommended plans. FAC ¶324. *See* Utah Code §20A-19-204(2)(a) (2018) (stating the Legislature must "either enact without change or amendment, … or reject the Commission's recommended redistricting plans submitted to the Legislature"). Second, Plaintiffs assert that after enacting the 2021 Congressional Plan, the Legislature did not "issue to the public a detailed written report setting forth the reasons for rejecting the [Commission's] plan or plans … and a detailed explanation why the redistricting plan enacted by the Legislature better satisfies [Proposition 4's] redistricting standards and requirements." Utah Code §20A-19-204(5)(a) (2018); *see* FAC ¶325. And finally, Plaintiffs argue that the Legislature failed to make its plan available for at least 10 calendar days "for assessment before it was enacted." FAC ¶326; *see* Utah Code §20A-19-204(4) (2018). Count VI's procedural claims thus arise entirely under Proposition 4's provisions, which Plaintiffs seek to revive through their Count V.

But these Proposition 4 provisions cannot be revived as Legislative Defendants explain in their summary judgment briefing. Leg-Defs.' Cross-MSJ at 43-48, 56. And thus, Count VI also fails.

Count VII, in turn, raises three allegations under Proposition 4's substantive provisions. First, Plaintiffs allege that the 2021 Congressional Plan is a partisan gerrymander in violation of Proposition 4's substantive provisions. FAC ¶¶330-40; *see* Utah Code §20A-19-103(3) (2018); *id.* §20A-19-103(5) (2018); *id.* §20A-19-103(4) (2018). Second, Plaintiffs allege that the 2021 Congressional Plan "unnecessarily" split municipalities and counties in violation of Proposition 4. FAC ¶¶342-47; *see* Utah Code §20A-19-103(2)(b) (2018). Third, Plaintiffs assert that the Legislature "excessive[ly]" split communities of interest in violation of Proposition 4. FAC ¶¶349-54; *see* Utah Code §20A-19-103(2)(e) (2018). Thus Count VII also arises entirely out of the Proposition 4 provisions that S.B. 200 amended. Because Count V fails, Leg-Defs.' Cross-MSJ at 33-38, 56, Count VII also fails.

Count VIII asserts that if this Court were to enjoin the 2021 Congressional Plan, then the 2011 Congressional Plan becomes operative again and that the 2011 Congressional Plan is allegedly malapportioned in violation of the one-person, one-vote principle under Article I, §§2, 24 of the Utah Constitution. FAC ¶¶356-62. This Count fails to the extent that it is premised on Counts V-VII.

Because Plaintiffs' Count V fails, and because Plaintiffs cannot revive the provisions of Proposition 4 that form the basis of Counts VI-VII, Counts VI-VII should be dismissed. And this Court should dismiss VIII to the extent that it is premised on Counts VI-VII.

B. Count VI fails because Proposition 4's procedural requirements intrude on the Legislature's constitutional prerogative to set its own rules and because Plaintiffs' requested relief is inappropriate.

Count VI seeks to impose the following procedural requirements on the Legislature by statute: (1) the mandatory up-or-down vote on the Commission's plans; (2) the requirement to issue a report explaining why the Legislature's adopted map is better than the Commission's recommended maps; and (3) the requirement that the Legislature make its plan available for public inspection for 10 calendar days. *See* FAC ¶¶324-26. This claim fails for two reasons.

First, the procedural requirements in Proposition 4 impair the Legislature's constitutional prerogative to set its own procedural rules. The Utah Constitution prescribes the Legislature's lawmaking procedure. It states that "[e]very bill shall be read by title three separate times in each house," and every bill shall pass "with the assent of the majority of all the members elected to each house." Utah Const. art. VI, §22. The Utah Constitution also requires that "[t]he presiding officer of each house, not later than five days following adjournment, shall sign all bills … passed by the Legislature." Utah Const. art. VI, §24. And then, the Legislature must "present[]" each passed bill "to the governor" for his approval. Utah Const. art. VII, §8. The Utah Constitution contains no further requirements about the "internal process that le[ads] to the bill's passage." *Gregory v. Shurtleff*, 2013 UT 18, ¶52, 299 P.3d 1098; *see also id.* ¶59 n.29 ("We are wary of imposing further requirements.").

In addition, the Utah Constitution expressly states that "[e]ach house shall determine the rules of its proceedings." Utah Const. art. VI, §12. The ability of each house of the Legislature to set its own rules is "constitutionally established." *Gallivan v. Walker*, 2002 UT 89, ¶59 n.11, 54 P.3d 1069. That power is "exclusive" and "subject only to clear pronouncements in the constitution as to procedure." *Pa. AFL-CIO v. Commonwealth*, 563 Pa. 108, 120 (2000). And "[a] rule of resolution is *solely* the product of the house or houses which adopt it." *People's Advocs., Inc. v. Superior Court*, 181 Cal. App. 3d 316, 325 (1986) (emphasis added). "The execution of internal rules" also implicates the substantive legislative power because it has always been inextricably "identified with the legislative process." *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975). Those rules concern "the direct business of passage or rejection of proposed legislation," which goes to the core of the legislative power and legislative deliberations. *Id.* Thus, "a statute may not control a rule of internal proceeding" of each house in a binding and irrevocable manner. *People's Advocs.*, 181 Cal. App. 3d at 325.

Proposition 4's procedural requirements asserted by Plaintiffs impermissibly impair the Legislature's constitutional prerogative to govern its own procedures. Leg-Defs.' Cross-MSJ at 43-45. Prescribing rules governing what bills the Legislature *must* consider, *see* FAC ¶324; Utah Code §20A-19-204(2)(a) (2018), by itself constitutes a serious imposition on the Legislature because such rules are

bound up with "the direct business of passage or rejection of proposed legislation." *Consumers Union*, 515 F.2d at 1351. Similarly, the procedural requirement that the Legislature issue a written report detailing why its enacted plan is better than the Commission's, *see* FAC ¶325; Utah Code §20A-19-204(5)(a) (2018), if it is to be set at all, must come from "[e]ach house" by its own rules, Utah Const. art. VI, §12, and not thrust upon the Legislature by an initiative that also threatens a lawsuit for non-compliance, *see People's Advocs.*, 181 Cal. App. 3d at 325. The Utah Constitution provides a specific method for enacting bills and leaves the rest to the Legislature's discretion and own procedural rules. *See* Utah Const. art. IX; *see also id.* art. VI, §§22, 24; *id.* art. VII, §8. Under "[g]eneral principles of separation of powers," this Court should be "wary," *Gregory*, 2013 UT 18, ¶59 n.29, of allowing a statute to supersede the constitutional prerogative of "[e]ach house" of a coordinate branch to set its own internal rules, Utah Const. art. VI, §12; *see also* Utah Const. art. V, §1; *Matheson v. Ferry*, 641 P.2d 674, 679 (Utah 1982) (invalidating a statutory Senate approval provision attempting to "control" the Governor's "process" of appointing judges).

In addition, Proposition 4's written-report requirement would have imposed on the Legislature the difficulty of ascertaining the will of 104 individual legislators through a written report. Legislators speak through their votes and the plain text of the bills that pass under the Utah Constitution's bicameral-passage and presentment requirements. *See* Utah Const. art. VI, §22; *id.* art. VII, §8(1). The written report that Proposition 4 contemplated would be akin to a committee report that would not undergo the bicameral or presentment processes. The Legislature as a whole does not—and cannot—speak through such reports. Further, requiring the legislators to explain their legislative acts, other than through the text of the bill, formal votes, or floor debates—and in explanations that in turn could be used in litigation, *see* Utah Code §20A-19-301(2) (2018)—would have contravened the Speech or Debate Clause, which provides that the "Members of the Legislature … shall not be questioned in any other place," Utah Const. art. VI, §8.

Likewise, any requirement that the Legislature make a bill available for public inspection and comment for 10 calendar days—if it is to be set at all—must come from "[e]ach house" by its own rules, Utah Const. art. VI, §12. In any event, with or without this provision, legislators are beholden

to their constituents and must be responsive to their concerns. *See, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 603 (2018) ("the good faith of the state legislature must be presumed" (cleaned up)); *Brnovich v. DNC*, 594 U.S. 647, 689-90 (2021) ("legislators have a duty to exercise their judgment and to represent their constituents").

These procedural limitations on the Legislature were also impermissible under the federal Elections Clause. *See* U.S. Const. art. I, §4. The federal Elections Clause "entrusts state legislatures with the primary responsibility for drawing congressional districts." *Alexander v. S.C. Conf. of the NAACP*, 602 U.S. 1, 6 (2024). Numerous justices have observed that this responsibility vested in the State legislatures by the federal Elections Clause "may [not] be excluded" and is subject to "exclusive" congressional oversight. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 841-42 (2015) (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.); *Alexander*, 602 U.S. at 50 (Thomas, J., concurring); *see also Moore v. Harper*, 600 U.S. 1, 56-57 (2023) (Thomas, J., dissenting, joined by Gorsuch, J.). The federal Elections Clause recognizes that redistricting is a function governed by "the ordinary constraints … in the *state constitution*." *Moore*, 600 U.S. at 29-30 (emphasis added) (quoting *Ariz. State Legislature*, 576 U.S. at 808).

Proposition 4's procedural limitations on the Legislature's redistricting role were not "the ordinary constraints on lawmaking in the state constitution." *Moore*, 600 U.S. at 29; *see also Ariz. State Legislature*, 576 U.S. at 808; *cf. Smiley v. Holm*, 285 U.S. 355, 362 (1932) (Minnesota Constitution subjected redistricting legislation to gubernatorial approval); *Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (Ohio Constitution permitted the rejection of a congressional plan by referendum). And interpreting the Utah Constitution to allow voter-passed statutory procedural requirements to control the Legislature's constitutional redistricting functions would "exceed[] the bounds of ordinary judicial review" and "violate[] the [federal] Elections Clause." *Moore*, 600 U.S. at 36. These Proposition 4 provisions are thus impermissible under the federal Elections Clause. Leg-Defs.' Cross-MSJ at 50-51.

Second, as relief for these alleged procedural violations, Plaintiffs seek to declare the entire 2021 Congressional Plan "invalid," enjoin its use, and institute a newly created map. *See* FAC Prayer for Relief. But remedy is limited to "correcting only those [unlawful] aspects of a state's plan." *Johnson*

v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (remedies limited to "correcting only those unconstitutional aspects of a state's plan"), *aff'd sub nom.*, *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.").[1] Applied here, Plaintiffs cannot explain why court-drawn congressional districts are an appropriate remedy for any "procedural" violations. A prospective mandatory injunction with redrawn congressional districts is not remotely tailored to past procedural violations—for example, making proposed districts publicly available for 7 days instead of 10 days. For these reasons, Count VI fails to state a claim.

C. Count VII fails because Proposition 4's substantive provisions raise nonjusticiable political questions and impermissibly impair the Legislature's redistricting responsibility.

Count VII alleges that the Legislature violated (1) Proposition 4's prohibition on purposefully or unduly favoring any incumbent, candidate, or political party; (2) its requirement to prioritize minimizing splitting municipalities and counties; and (3) its requirement to prioritize avoiding splitting communities of interest. FAC ¶¶329-54. Count VII fails for two reasons.

First, Count VII requires this Court to decide nonjusticiable political questions. Not all disputes raise controversies justiciable in Utah courts. The political-question doctrine ensures that this Court does not adjudicate "matters wholly within the control and discretion of other branches of government." *Matter of Childers-Gray*, 2021 UT 13, ¶62, 487 P.3d 96. The political-question doctrine stems from the separation-of-powers principle enshrined in Article V, §1 of the Utah Constitution. *Id.* Utah's standard for determining whether a controversy presents a non-justiciable political question mirrors the federal standard. *See id.* ¶64 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Claims are not justiciable if committed to a different branch of government, *e.g., Luther v. Borden*, 48 U.S. (7 How.) 1,

[1] *Accord North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (per curiam) (partially reversing remedy for going beyond eliminating racial gerrymander); *Perry v. Perez*, 565 U.S. 388, 393 (2012) (courts "should take guidance from the State's recently enacted plan in drafting an interim plan" to "avoid being compelled to make such otherwise standardless decisions"); *White v. Weiser*, 412 U.S. 783, 795 (1973) (courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'"); *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (court "erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved").

43 (1849), or have no judicially manageable standard for resolving the dispute, *e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (plurality op.), or require policymaking, *e.g., Ogden City v. Stephens*, 21 Utah 2d 336, 339 (1968) ("the necessity, expediency, or propriety of opening a public street or way is a political question"); *Green v. Frazier*, 253 U.S. 233, 240 (1920). *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.) (describing "six independent tests" for justiciability from *Baker*).

Critically, "a statute providing for judicial review does not override" the requirement that courts "refrain from deciding political questions." *Jaber v. United States*, 861 F.3d 241, 246 (D.C. Cir. 2017) (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010)) (holding that claims under the Torture Victim Protection Act and the Alien Tort Statute are not justiciable to the extent they implicate political questions); *El-Shifa*, 607 F.3d at 844 (same regarding the Federal Tort Claims Act); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (same regarding the TVPA).

Count VII is barred because redistricting is a function textually committed to the Legislature under Article IX of the Utah Constitution. "A controversy is nonjusticiable … where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993). This test requires, "in the first instance, interpret[ing] the text in question and determin[ing] whether and to what extent the issue is textually committed" to another branch. *Id.* That's straightforward here: for all the reasons discussed in Section I, the Utah Constitution commits the issue of redistricting to the Legislature. Article IX requires "the Legislature"—not Utah courts—to "divide the state into congressional, legislative, and other districts." Utah. Const. art. IX, §1.

Count VII is also barred because there's no judicially manageable standard to decide Plaintiffs' claims. Proposition 4 broadly prohibited any district that "*unduly* favors or disfavors any incumbent elected official, candidate or prospective candidate for elective office, or any political party." Utah Code §20A-19-103(3) (2018) (emphasis added). That language goes beyond what the Legislature *intends*; it encompasses whether the Legislature's proposed districts might, in *effect*, favor one party too much more than another. But it is "impossible to assess the effects of partisan gerrymandering" when

"[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality op.). And Proposition 4 stops short of defining when favoring one party over another qualifies as "unduly" favoring it. Policing those *effects* will elude Utah courts no less than partisan gerrymandering claims elude courts in other States.[2] Because Utah is not the "mythical State with voters of every political identity distributed in an absolutely gray uniformity," any division of voters into separate districts will "always carr[y] some consequence for politics," whether intended or unintended. *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

A court cannot decide whether those political consequences "unduly" favor a political party without first deciding what the baseline is—that is, what is "fair"? Deciding what is "fair" will first require judges to act as pollsters, predicting how voters will vote and how candidates will fare in future elections that have not yet occurred. *Rucho*, 588 U.S. at 711-13; *see Vieth*, 541 U.S. at 287 (plurality op.) (a voter's political affiliation "is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line"). That task is especially difficult in Utah when more than one-third of Utahns are not registered with either major political party.[3] "These facts make it impossible to assess the effects of" alleged "partisan gerrymandering." *Vieth*, 541 U.S. at 287. And even if courts could predict the future, deciding what is "fair" would next require them to "make their own political judgment about how much representation particular parties *deserve*—based on the votes of their supporters [statewide]—and to rearrange the challenged districts to achieve that end." *Rucho*, 588 U.S. at 705. In a State like Utah, where only 13.7% of registered statewide voters are Democrats, what "unduly" disfavors the majority party? And how is a court to factor in that the federally required system of single-member districts will seem inherently unfair to some? After all, "the voting strength of less evenly distributed groups will *invariably be diminished*" in single-member, winner-take-all districts "as compared to at-large proportional systems for electing

[2] *See, e.g.*, *Rucho v. Common Cause*, 588 U.S. 684, 691 (2019) (describing how the U.S. Supreme Court "struggled without success over the past several decades to discern judicially manageable standards for deciding such claims"); *Rivera v. Schwab*, 512 P.3d 168, 182 (Kan. 2022); *Harper v. Hall*, 886 S.E.2d 393, 424-25, 427 (N.C. 2023).

[3] "Current Voter Registration Statistics" (Sept. 23, 2024), vote.utah.gov/current-voter-registration-statistics/.

representatives." *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment) (emphasis added). These questions are questions of political philosophy, not judicial remedies.

Plaintiffs' allegations that the 2021 Congressional Plan "unnecessarily" splits municipalities, counties, and communities of interest are similarly without manageable judicial standards and boil down to policymaking. FAC ¶¶343, 350. As a threshold matter, Proposition 4 doesn't outright prohibit splitting municipalities, counties, and communities of interest. Nor could it. In Utah, the population is centered around one area (the Wasatch Front) that must be split to have roughly 817,904 persons in each congressional district to comply with the U.S. Constitution. *See, e.g.*, *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Thus, the U.S. Constitution precludes the Legislature from placing all of Salt Lake County, which has a population exceeding 1.185 million, within one congressional district.[4] Splitting municipalities, counties, and communities of interest is unavoidable. Besides, the Legislature does not redistrict "in a vacuum." *Alexander*, 602 U.S. at 43 (Thomas, J., concurring). "[E]lectoral districting is a most difficult subject for legislatures," and requires the "exercise [of] the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The "complex interplay of forces … enter a legislature's redistricting calculus." *Alexander*, 602 U.S. at 7. Redistricting requires "political compromises," not "legal answers." *Alexander*, 602 U.S. at 43 (Thomas, J., concurring). Here, entertaining Plaintiffs' claims that the Legislature "unnecessarily" split municipalities, counties, and communities of interest, FAC ¶¶353, 350, necessarily invites courts to review the Legislature's political and policy judgment—and without any judicially manageable standards. Plaintiffs offer no standard to determine what constitutes an "unnecessar[y]" or "excessive" splitting. FAC ¶¶343, 346, 350, 353. Because Proposition 4 requires courts to decide political questions, Count VII fails.

Second, Proposition 4's substantive requirements impermissibly impair the Legislature's redistricting responsibility. Leg-Defs.' Cross-MSJ at 33-34. Article IX's "specific[] vest[ing]" of the redistricting function to the Legislature "must be considered as a limitation" on restricting that function by

[4] Salt Lake County, Utah, Census Bureau, www.census.gov/quickfacts/saltlakecountyutah.

statute. *Evans & Sutherland Comput. Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 442 (Utah 1997). As the Legislative Defendants already explained, Leg-Defs.' Cross-MSJ at 33-34, Proposition 4's requirements impermissibly impair the Legislature's redistricting responsibility under Article IX.

They also impair the redistricting responsibility delegated under the federal Elections Clause. *See supra* at 7; Leg-Defs.' Cross-MSJ at 39-41. Only once has the Supreme Court held that the Elections Clause permitted a body that was *not* "the Legislature," U.S. Const. art. I, §4, to impair a legislature's redistricting responsibility. In *Arizona State Legislature*, the Court held that a commission could redistrict Arizona's congressional districts, even though the Elections Clause vested that authority in "the Legislature." 576 U.S. at 817. The Court reasoned that the term "the Legislature" in the Elections Clause could include "the people" of Arizona because Arizona voters had amended the Arizona Constitution to transfer redistricting responsibility from the Legislature to a commission in the state constitution's equivalent of Article IX. *Id.* at 813-14. But *Arizona State Legislature* illustrates how Proposition 4's proponents overstepped in Utah. The Arizona and Utah constitutions differ in the most fundamental way: Arizona voters can directly amend their constitution through initiatives. *See id.* at 817. Utah voters, in contrast, cannot; our 1900 amendments adding an initiative power to the Utah Constitution authorized voters to initiate *statutes* but (unlike in Arizona) do not let Utah voters initiate constitutional amendments. *See LWV*, 2024 UT 21, ¶ 161.

In effect, Proposition 4 tried to mimic the Arizona amendments at issue in *Arizona State Legislature*, but without an equivalent state constitutional basis to do so. That makes Proposition 4 not "an ordinary constraint[] on lawmaking in the state constitution." *Moore*, 600 U.S. at 29-30. Unlike the Arizona voters who formally amended the Arizona Constitution by initiative, 576 U.S. at 792, 817-18, Utah's voters could not and did not amend the Utah Constitution through Proposition 4, *LWV*, 2024 UT 21, ¶161. Allowing substantive standards in a voter-passed statute, and not found in the Utah Constitution, to constrain the Legislature's discretion would impermissibly restrict the Legislature's federally delegated redistricting authority. *See Moore*, 600 U.S. at 29-30; *Ariz. State Legislature*, 576 U.S. at 808.

The federal Elections Clause also prohibits "read[ing] state law in such a manner as to circumvent federal constitutional provisions." *Moore*, 600 U.S. at 35. And under the federal Elections Clause, state-court interpretations of state law "may not transgress the ordinary bounds of judicial review such that [courts] arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. Reading the Utah Constitution to allow Proposition 4's voter-passed statutory standard to override the Legislature's constitutional discretion under Article IX—especially after the Utah Supreme Court held that Proposition 4 cannot amend the Utah Constitution, *LWV*, 2024 UT 21, ¶161—would "transgress the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36.

D. Count VIII fails because Plaintiffs' challenge to the 2011 Congressional Plan is moot and Plaintiffs lack standing.

Count VIII alleges that the 2011 Congressional Plan—not the 2021 Congressional Plan—is malapportioned in violation of Article I, §§2, 24 of the Utah Constitution. FAC ¶¶355-61. This count fails for four reasons.

First, Plaintiffs wrongly assume that if this Court were to enjoin the 2021 Congressional Plan, the 2011 Congressional Plan would become operative again. *See* FAC ¶356. The 2011 Congressional Plan no longer exists. The Legislature "repeal[ed]" that plan in 2021. This Court cannot revive a non-existent law. H.B. 2004 Congressional Boundaries Designation, Utah State Legislature, le.utah.gov/~2021s2/bills/static/HB2004.html; *cf.* Utah Code §68-3-5 ("The repeal of a statute does not revive a statute previously repealed.").

Besides courts do not enjoin or "erase" or "strike down" statutes; they enjoin *defendants* from enforcing statutes. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935-37 (2018) (describing flawed "assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute"); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 88 (2014) ("Courts do not invalidate statutory rules in a literal sense, and therefore do not, strictly speaking, grant a remedy that makes a statutory provision ineffective."); *see, e.g., Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear."); *Winsness v. Yocom*, 433 F.3d 727,

728 (10th Cir. 2006) (McConnell, J.) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring) ("[Courts] do not remove—'erase'—from legislative codes unconstitutional provisions."); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("It is often said that courts 'strike down' laws when ruling them unconstitutional. That's not quite right. … Courts hold laws unenforceable; they do not erase them."); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 22-2036, 2023 WL 4635932, at *15 (Iowa June 16, 2023) (op. of McDonald, J.) (describing that "well settled" principle of American law). This Court cannot erase the 2021 Congressional Plan even if it were to conclude that the Plan is invalid and enjoins its enforcement. Nor can it revive the 2011 Congressional Plan that's been repealed.

Plaintiffs' assumption that this Court would revive the now-repealed 2011 Congressional Plan on the way to remedying the alleged defects with the 2021 Congressional Plan is nothing short of asking this Court to legislate. Plaintiffs' assumption also ignores Article IX, §1 and the federal Elections Clause, which expressly assign the redistricting function to the Legislature. Indeed, because redistricting is "primarily a matter for legislative consideration and determination," even where a violation is found, courts' role should be modest, and they should give legislatures "an opportunity to remedy" the violation. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Any remedy for defects in the 2021 Congressional Plan cannot be to revive the now-repealed 2011 Congressional Plan, which Plaintiffs themselves allege is unlawful, or to wrest the redistricting decision entirely away from the Legislature.

Second, Plaintiffs' claim is moot. The repeal of a challenged law "render[s]" the case "moot." *Shipman v. Evans*, 2004 UT 44, ¶33, 100 P.3d 1151, *abrogated in part on other grounds*, *Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, 175 P.3d 1036.

Third, Plaintiffs lack standing to challenge the 2011 Congressional Plan. To start, to allow Plaintiffs to "attack" a nonexistent and thus "unenforceable statutory provision" would amount to allowing for "an advisory opinion without the possibility of any judicial relief." *California v. Texas*, 593 U.S. 659, 673 (2021). For another, Plaintiffs fail to allege facts establishing standing. At a minimum,

that would require Plaintiffs to allege that they reside in the congressional districts under the 2011 Congressional Plan that they seek to challenge. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (plaintiff must "live[] in the *district* attacked"). Nowhere in the first amended complaint do Plaintiffs allege in which districts under the 2011 Congressional Plan they reside or would have resided.

Fourth, Count VIII fails to the extent that its assertion that the 2021 Congressional Plan is invalid assumes success on Counts VI-VII. Plaintiffs assume that this Court would enjoin the 2021 Congressional Plan and somehow revive the 2011 Congressional Plan. But the 2021 Congressional Plan withstands Counts VI-VII because Plaintiffs' Count V fails.

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For these reasons, the Court should dismiss Counts VI-VIII.

II. The Court should stay further proceedings pending the resolution of Count V and any subsequent and pending appeals.

Judicial economy counsels in favor of staying further proceedings on Plaintiffs' claims until Count V is resolved in this Court and in any appeal, and until the Utah Supreme Court resolves the currently pending appeal on Counts I-IV.

Plaintiffs' Counts I-IV in the first amended complaint are the same as what Plaintiffs alleged in the original complaint. *Compare* FAC ¶¶257-309. The Utah Supreme Court "retain[ed] jurisdiction" over these claims "pending resolution of Count V." *LWV*, 2024 UT 21, ¶220. Soon after the Utah Supreme Court granted the parties' petitions for interlocutory appeal, this Court stayed the proceedings on Counts I-IV, observing that "the Utah Supreme Court's decision could significantly impact this case" and "if the case moves forward, limit Plaintiffs' claims and/or narrow the scope of discovery." Stay Order (Doc 270). The same considerations for preserving the "judicial economy" apply now, *id.*, and Counts I-IV should remain stayed until the Utah Supreme Court relinquishes jurisdiction.

Counts VI-VII are premised entirely on Count V and the revival of the various Proposition 4 provisions. If the Court agrees with the Legislative Defendants that Count V fails and that S.B. 200 was properly enacted, then Counts VI-VII necessarily fail. Even if this Court were to side with Plaintiffs on Count V, that is not the end of the case. Besides appellate review of any liability determination,

this Court would also need to decide the appropriate remedy for Count V. And Counts VI-VIII independently require further litigation past the motion-to-dismiss stage and fact and expert discovery to test Plaintiffs' standing, litigate the claims on the merits, and determine any appropriate relief. The Legislative Defendants—as any other litigants—are entitled to use these procedures and reserve the right to test Plaintiffs' case on Counts VI-VIII. The most prudent course is to stay further proceedings until Count V is definitively resolved so that the parties and this Court know what the governing law is—whether it's S.B. 200, Proposition 4, or the various provisions of the Utah Constitution.

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' Counts VI-VIII. Alternatively, this Court should stay further proceedings on those counts until Count V is resolved both in this Court and in any subsequent appeal to the Utah Supreme Court and until the Utah Supreme Court resolves Counts I-IV.

Dated: November 8, 2024

Respectfully submitted,

/s/ Tyler R. Green

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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: November 8, 2024 */s/ Tyler R. Green*